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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 546

GEORGE E. EDDY and SAMUEL SILBIGER,
Petitioners,

PRUDENCE-BONDS CORPORATION, et al.

BRIEF OF RESPONDENT PRUDENCE-BONDS CORPORATION IN OPPOSITION TO PETITION FOR WRITS OF CERTIORARI

Opinions Below

The Court of Appeals for the Second Circuit rendered no opinions in making the three orders which petitioners seek to review.

Jurisdiction

Two of the orders were entered on October 21, 1949 (R. 68-69); the third order was entered on November 7, 1949 (R. 76). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended, 28 U. S. C., Sec. 347(a) and Section 24c of the Bankruptcy Act, 11 U. S. C., Sec. 47(c).

Petitioners' Questions

The substance of the questions petitioners seek to raise is:

1. Whether the Court of Appeals abused its discretion in denying petitioners' application for leave to appeal an order made in a bankruptcy reorganization proceeding awarding an allowance of $75,000 to petitioner Silbiger and allowances totaling $32,500 to three other attorneys for services in a proceeding in the reorganization court to construe the confirmed Plan of Reorganization of the Debtor.

2. Whether the order on allowances was appealable by petitioners as of right by notice of appeal and without leave of the Court of Appeals.

On an earlier occasion in this reorganization these same petitioners, in an effort to increase a prior allowance of $6,000 awarded to petitioner Silbiger, sought to raise these same questions and their petition for certiorari was denied (R. 49, 72; *Eddy* v. *Kelby*, 319 U. S. 755).*

Preliminary Statement

Petitioners seek review of three orders of the Court of Appeals for the Second Circuit. Under the decision of this Court in *Dickinson Industrial Site, Inc.* v. *Cowan*, 309 U. S. 382, two of the orders were within the discretion of the Court of Appeals and the third order was required as a matter of law.

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* On still another occasion, this Court denied a petition of these same petitioners to review an order of the Court of Appeals affirming on the merits an order of the bankruptcy court awarding petitioner Silbiger an allowance of $40,000 (*Eddy* v. *Kelby*, 163 F. 2d 56, cert. denied 332 U. S. 836).

The first of the orders denied petitioners' application for leave to appeal the order of the bankruptcy court (Eastern District of New York) awarding allowances as aforesaid (R. 30, 69).

The second order granted respondent Prudence-Bonds Corporation (New Corporation) and Reconstruction Finance Corporation (hereinafter called "RFC") leave to appeal the order on allowances, but limited the scope of their appeal "to the question of conflict of interest represented" (R. 68-69).

The third order dismissed, on motion of respondent, an appeal petitioners sought to take from the order on allowances as a matter of right by filing a notice of appeal (R. 69-70, 75, 76).

The applications for leave to appeal were timely made and petitioners' notice of appeal was timely filed and this is not a case where a party has made a justifiable mistake in pursuing the wrong method of appeal.

Petitioners' ultimate object in seeking certiorari is to increase the allowance of $75,000 awarded to petitioner Silbiger (R. 30).

Petitioner Eddy, a bondholder client of petitioner Silbiger (R. 51), did not apply for any allowance (R. 5) and is not aggrieved by any of the three orders. Petitioner Silbiger did not oppose the application of respondent and RFC for leave to appeal (R. 49), and is not aggrieved by the limited leave to appeal granted to said applicants (R. 68-69).

Since the three orders were made, the limited appeal of respondent and RFC was taken, heard and decided; the Court below unanimously holding that Mr. Silbiger represented two groups of bondholders who had conflicting interests in the proceeding in respect of which Mr. Silbiger rendered his services, that Mr. Silbiger opposed and was disloyal to one of the interests he represented, and, that the amount of his allowance should be reduced "by at least one-third" or more at the discretion of the bankruptcy court Judge (*Silbiger, et al.* v. *Prudence-Bonds Corporation*, C. C. A. 2, March 7, 1950).

The Facts

The order of the bankruptcy court which petitioners sought to appeal was made in the proceeding for reorganization of Prudence-Bonds Corporation, Debtor, under Section 77B of the Bankruptcy Act (R. 1, 30). Although the Plan of Reorganization was confirmed in 1938 (R. 8), the Debtor's Estate is in process of administration in that respondent, the Trustee of the Debtor, and other parties have been and still are engaged in accounting proceedings to compel restoration of trust funds securing the Debtor's bonds (R. 9).

The Trustee of the Debtor is still acting, no report has been filed showing that the Plan has been carried out, and no final decree has been entered closing the estate (R. 71).

When the Debtor filed its petition for reorganization it had outstanding eighteen Series of bonds, each secured by a Trust Agreement made by the Debtor to a Bank or Trust Company, as Trustee, under which bonds and mortgages and other securities were assigned and delivered to the Trustee as a Trust Fund for the benefit and security of the bondholders (R. 8-9).

During the course of the reorganization the Debtor was found to be insolvent (Prior record, p. 31 *). Thereafter and in 1938, the Plan of Reorganization, consisting of a separate Plan for each Series of bonds and a General Plan, was confirmed (R. 8). The separate Series Plans, except one, were all substantially the same (R. 9).

All Series of bonds were guaranteed by The Prudence Company, Inc. which also went into reorganization, was found to be insolvent, and was reorganized and succeeded by a new company named Prudence Realization Corporation (Prior record, p. 30). The Prudence Company, Inc.

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* "Prior record" as used in this brief and in the petition refers to record in petition for certiorari, *Prudence Realization Corporation* v. *Eddy*, 333 U. S. 845.

held some bonds of each Series and in the proceeding for reorganization of Prudence-Bonds Corporation such bonds were subordinated to the bonds in the hands of the public (Prior record, pp. 31-34).

The Plan of Reorganization of Prudence-Bonds Corporation provided, in part, for a New Corporation of the same name as the Debtor to be owned by the bondholders, for an extension of the maturity of the bonds, and changes in interest provisions (R. 78). Eleven Banks had been Trustees of the bond issues (R. 9). Under the Plan, City Bank Farmers Trust Company became Trustee of all Series under a Supplemental Trust Agreement with respondent, the new Prudence-Bonds Corporation (R. 78). Upon confirmation, jurisdiction was reserved to effectuate and carry out the Plan (R. 78).

As part of the proceedings to carry out the Plan, the bankruptcy court, among other things, authorized and directed the former Corporate Trustees of the bond issues to account in the reorganization court for their acts as Trustees (R. 9). Jurisdiction over the accountings was upheld in *Central Hanover B. & T. Co.* v. *President and Directors of the Manhattan Co.*, 105 F. 2d 130. There then ensued extensive litigation relating to the accountings which has been the subject of several further decisions of the District Court and of the Court of Appeals and several petitions for certiorari.*

On the accountings in fifteen of the eighteen Series on bonds approximately $4,277,100 was recovered for the Trust Funds and allowances for services and expenses in connection therewith were heretofore awarded by the bank-

* *Manufacturers Trust Co.* v. *Kelby*, 125 F. 2d 650, cert. denied 316 U. S. 697; *Brooklyn Trust Co.* v. *Kelby*, 134 F. 2d 105, cert. denied 319 U. S. 767; *President and Directors of the Manhattan Co.* v. *Kelby*, 57 F. Supp. 839, modified and affirmed 147 F. 2d 465, cert. denied 324 U. S. 866; *Eddy* v. *Kelsey*, 148 F. 2d 323; *In re Prudence-Bonds Corporation*, 76 F. Supp. 643; see also, *Eddy* v. *Kelby*, 319 U. S. 755, and *Eddy* v. *Kelby*, 163 F. 2d 56, cert. denied 332 U. S. 836, relating to allowances in the accounting proceedings.

ruptcy court (R. 9). The accountings in two Series are pending (R. 9).

In the fall of 1945, following the collection of a large judgment against one of the accounting Corporate Trustees, a question arose regarding the meaning of provisions of the Plan relating to interest payable on the reorganized bonds (R. 9-10).

The services for which petitioner Silbiger was awarded the instant allowance of $75,000 (R. 5), were rendered in the proceeding in the reorganization court which determined this question (R. 10-18), and which, for convenience, has been called the "Construction Proceeding" (R. 4). The question arose in this way:

The Trust Funds of some Series contained collateral sufficient to pay the principal of the publicly held bonds of the Series and leave an excess in principal account, but the excess was not sufficient to pay the arrears of interest on such bonds at the original bond rate. The Trust Funds of other Series are insufficient to pay the principal of the publicly held bonds of the Series. The Plan, as confirmed, provided that interest on the bonds was payable at the rate of 5½% per annum, but only to the extent that income on the Trust Fund collateral would suffice to pay such interest, and, in substance, that no payments of principal or interest were to be made on the subordinated bonds of a Series until the publicly held bonds of the Series were paid in full (R. 9-10; also Prior record, pp. 31-34). The Plan further provided that upon retirement of all bonds of a Series all collateral remaining in the Trust Fund was distributable, when liquidated, *pro rata* among the other Series of bonds (R. 10).

The main question which thus arose was how collateral in principal account of the Series in excess of an amount sufficient to pay the principal of the publicly held bonds of the Series was distributable among the three classes of creditors having an interest therein; namely, 1) the pub-

licly held bonds, 2) the subordinated bonds, and 3) the other Series of bonds.* This in turn raised the question: When were the publicly held bonds to be deemed paid in full? Were they paid in full upon payment of principal with income interest only, or were they entitled to unpaid interest at the original bond rate and to have such arrears of interest paid out of the corpus of the Trust Funds before any payments could be made to subordinate lienors? †

To obtain a judicial determination of the question respondent, the new Prudence-Bonds Corporation, and City Bank Farmers Trust Company, the new Trustee of all Series, petitioned the reorganization court for instructions (R. 10-14).

The issue was referred to a Special Master who reported, in substance, that the bonds were income bonds on which interest was payable only to the extent earned on the collateral.

Under the Special Master's Report, collateral in excess of the principal of the publicly held bonds of a Series was distributable first, to pay the principal of the subordinated bonds of the Series, and the balance then remaining was distributable *pro rata* among the other Series of bonds,

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* In the Fifth and Ninth Series there was an additional creditor. The Bank, which was the former Trustee, obtained on payment of the surcharge recovered against it liens of $85,825 and $88,124.98 on the Fifth and Ninth Series Trust Funds respectively (R. 9). These liens were subordinated to all bonds of the respective Series, including the subordinated bonds (R. 9), and thus had priority over the above mentioned class 3 creditors, namely, the other Series of bonds. In addition, the judgment against the Bank provided that if the bonds of either the Fifth or Ninth Series were "paid in full", the Bank could apply "for relief by way of repayment to it of any surplus remaining in the Trust Fund" (R. 9).

† Certain subsidiary questions relating to adjustments of funds between principal and income accounts were also involved in the "Construction Proceeding", but these questions became moot by the decision of the Court of Appeals on the main question (*Eddy* v. *Prudence-Bonds Corporation*, 165 F. 2d 157).

with the exception that in the Fifth and Ninth Series the above mentioned subordinate liens of the Bank were to be paid first out of collateral remaining after payment of the principal of the subordinated bonds of said Series respectively.

The Master's Report was confirmed by the District Court Judge, and on appeal taken by petitioner Eddy and others the order of the District Court was reversed (*Eddy* v. *Prudence-Bonds Corporation,* 165 F. 2d 157), certiorari was denied (333 U. S. 845) and the "Construction Proceeding" was concluded in July, 1948 (R. 14-15).

Under the decision of the Court of Appeals, collateral remaining in principal account of a Series after payment of the principal of the publicly held bonds of the Series is distributable on account of arrears of interest on the publicly held bonds computed at the original bond rate to the date of final payment of principal (165 F. 2d 157).

Following the conclusion of the "Construction Proceeding", petitioner Silbiger and others applied for allowances. The allowance applications were first passed upon by a Special Master whose Report was confirmed (with one modification not here material) by order of the District Court dated July 29, 1949 (R. 3-5, 30-32), which is the order petitioners sought to appeal (R. 50, 75).

The services rendered by petitioner Silbiger in the "Construction Proceeding", were substantially as follows: He attended three hearings before the Special Master, but did not examine any witnesses, introduce any evidence, or file any affidavits. He filed a memorandum with the Master, objections to the Master's Report, attended two hearings on the Report, and filed a brief with the District Court. He prepared notices of appeal, designations as to the contents of the record and he prepared the record on appeal. He moved to consolidate the appeals and for a preference, neither of which motions was opposed. He filed a brief and a reply brief with the Court of Appeals,

argued the appeal orally, filed a brief in opposition to the petition for certiorari, and had a part in the preparation of the orders on the mandate of the Court of Appeals (R. 11-12, 15-16). Petitioner Silbiger did not prepare the petitions and orders to show cause which instituted the "Construction Proceeding", he did not prepare the orders of reference, nor did he prepare the orders of the District Court (R. 11-12).

Petitioner Silbiger, who had the burden of proving his services, estimated he devoted in excess of 200 days to the "Construction Proceeding", but based his estimate on recollection which he could not substantiate by any diary or docket entries (R. 19). In supporting his estimate of time he claimed, for example, that in one period of 39 days he devoted 38 full days and many nights, including Christmas, New Year's Day, and five Saturdays and Sundays, notwithstanding that in the same 39-day period he devoted many days to other matters (R. 19). Petitioner Silbiger further claimed he devoted 30 days considering whether he would appeal, many more days preparing the record on appeal, and another 30 days writing his brief on the appeal, notwithstanding that such brief was substantially the same as his brief in the District Court (R. 19).

In his brief on the appeal in the "Construction Proceeding" petitioner Silbiger said, "In the case at bar no dispute as to any facts ever arose. * * * The only issues presented herein are issues of law, involving the interpretation of the plans * * * " (R. 16). In his brief in opposition to the petition for certiorari in the "Construction Proceeding" he said, "No controversy of public interest or importance with respect to legal principles is involved" (R. 17).

For his services solely in the "Construction Proceeding", involving no dispute of facts and only one appeal,

petitioner Silbiger requested an allowance of $459,500; he was awarded $75,000 (R. 17).*

I

Appeal from the order on allowances could be had only at the discretion of the Court of Appeals.

In *Dickinson Industrial Site, Inc.* v. *Cowan,* 309 U. S. 382, this Court held that under Section 250 of the Bankruptcy Act appeals from orders on allowances in corporate reorganizations "may be had only at the discretion of the Circuit Court of Appeals".

In attempting to avoid the rule of the *Dickinson* case, petitioners contend that the services petitioner Silbiger rendered in the "Construction Proceeding" "were not such as are comprised within or intended to be regulated by Article XII of the Bankruptcy Act" (Petition, p. 13). Petitioners further contend that the "proceedings for instructions by the new corporation and the Successor Trustee were suits in equity to obtain an adjudication of the rights of conflicting claimants to the trust funds" (Petition, p. 15).

Petitioners' contentions are untenable. The "Construction Proceeding" was a summary proceeding in bankruptcy instituted by petition and order to show cause (R. 10-11, 13-14; see also Prior record, pp. 106-108, 427-429, 490-492, 530-532). The proceeding was instituted while the Debtor's estate was in process of administration under the jurisdiction of the bankruptcy court; it was instituted before the Plan was consummated or carried out, and before a final decree was entered closing the estate.

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* Respondent contended the allowance petitioner Silbiger requested was "so exorbitant as to shock the conscience of a court of equity" (R. 7). Petitioner Silbiger's practice of exaggerating the value of his services is indicated by the fact that in connection with the accounting proceedings he applied for allowances aggregating $389,261.05, as compared with his awards of $69,750 (see pp. 244, 247, 259-260 of record on petition for certiorari in *Eddy* v. *Kelby,* 163 F. 2d 56, cert. denied 332 U. S. 836).

Petitioners' contention appears to be that Section 250 of the Bankruptcy Act is applicable only to services rendered up to the time of confirmation of a Plan and not to post-confirmation services in carrying out a Plan. There is no basis for such distinction. An order confirming a Plan is not analogous to a confirmation of a composition. The latter operates as a discharge, the former is but a step in the administration of the estate; in a corporate reorganization a discharge is affected not by confirmation of a Plan but by the final decree (*Meyer* v. *Kenmore Granville Hotel Co.*, 297 U. S. 160, 166). Until the Plan is fully carried out the estate is in process of administration and the Bankruptcy Act is the controlling statute (*In re Paramount-Publix Corp.*, 82 F. 2d 230, 232-233).

In cases decided under the former Bankruptcy Act involving services in plenary suits to set aside fraudulent transfers, allowances for such services were passed upon by the bankruptcy court. And orders on such allowances were administrative orders governed by former Section 24b (11 U. S. C. 47b), and were appealable only at the discretion of the Court of Appeals (*In re Barceloux*, 74 F. 2d 289, 294).

In *Shulman* v. *Wilson-Sheriden Hotel Co.*, 301 U. S. 172, the allowances were for services in a state court foreclosure suit antedating the Section 77B proceedings. The awards were made after confirmation of a Plan. This Court held that under former Section 24b, appeal from the allowance order could be had only at the discretion of the appellate court. Cf. *Gross* v. *Irving Trust Co.*, 289 U. S. 342. And in the *Dickinson* case, *supra*, this Court said that the history of Section 250 indicated that the purpose of the section was "to carry over into the new act the rule of" the *Shulman* case (309 U. S. 382, 385).

Since the decision of this Court in the *Dickinson* case, *supra*, the Courts of Appeals have uniformly held that Section 250 applies to all orders on allowances in corporate reorganizations. They have consistently declined to en-

graft exceptions on the rule that appeals from such orders may be had only at their discretion (*In re Von Kozlow Realty Co.*, 116 F. 2d 673; *In re Prudence-Bonds Corporation*, 111 F. 2d 37, 41, reversed on other grounds, 311 U. S. 579; *In re Country Club Bldg. Corp.*, 128 F. 2d 36; *In re Seville Court Apt's Bldg. Corp.*, 134 F. 2d 232; *Cohen* v. *Casey*, 152 F. 2d 610; Cf. *Gross* v. *Bush Terminal Co.*, 105 F. 2d 930; *R. F. C.* v. *Bankers Trust Company*, 318 U. S. 163).

Petitioners' contention that petitioner Silbiger's right to an allowance stems from Section 475 of the Judiciary Law of the State of New York providing for an attorney's lien on a cause of action or judgment therein is without merit. The bankruptcy court's jurisdiction is exclusive and embraces all services in connection with the reorganization proceeding, in connection with the Plan, and incident to the reorganization (*Leiman* v. *Gutman*, 336 U. S. 4; *Brown* v. *Gerdes*, 321 U. S. 178).

II

The Court of Appeals did not abuse its discretion in denying petitioners' application for leave to appeal.

Petitioners have failed completely to show any abuse of discretion on the part of the Court of Appeals in denying their petition for leave to appeal. Petitioners in the Court below and in this Court have not made out any *prima facie* case of inequitable treatment by the bankruptcy court in respect of the allowance to petitioner Silbiger. His allowance of $75,000 was generous, if indeed not excessive, for services in a proceeding to construe a Plan of Reorganization involving no dispute of facts and only one appeal, particularly in the light of the facts that petitioner Silbiger did not render extensive services or institute the "Construction Proceeding" or prepare any of the basic

pleadings (see *supra*, pp. 9-10). Moreover, as we have pointed out, *supra*, pages 3-4, the Court of Appeals, after hearing respondent's appeal on the merits, has determined that petitioner Silbiger opposed and was disloyal to one group of bondholders he represented and that his allowance should therefore be reduced.

Petitioners' contention that the law regarding allowances in bankruptcy "is in a hopeless, chaotic state if what is 'reasonable' for an attorney to charge and expect to be awarded * * * is entirely dependent upon accident, whether he appears before a Judge Hough, a Judge Valente, or any other Judge of like psychology" (Petition, p. 23) is frivolous.

This Court has several times expressed its views on bankruptcy allowances (*In re Gilbert*, 276 U. S. 294; *Realty Associates Sec. Corp.* v. *O'Connor*, 295 U. S. 295; *Callaghan* v. *R. F. C.*, 297 U. S. 464; *Dickinson Industrial Site, Inc.* v. *Cowan, supra; Brown* v. *Gerdes, supra; Leiman* v. *Gutman, supra*).

Percentage fees allowed in stockholders' suits cited by petitioners are not pertinent. The allowances in such suits were payable by solvent individuals or corporations, such as John D. Rockefeller, National City Bank, The Chase Bank and General Motors Corporation. A proceeding in bankruptcy to construe a plan of reorganization is not comparable to a stockholders' suit resulting in large recoveries for a going concern. As the Court said in *Winkelman* v. *General Motors*, 48 F. Supp. 504, 507, cited by petitioners (and in which the Court referred to articles by Mr. Hornstein in the Columbia Law Review, also cited by petitioners): "* * * large percentage fees * * * have been the subject of considerable comment, if not more" and "Precedents as to percentages allowed are of slight value because the amounts varied in the cases cited as did the effort required to make the recovery".

CONCLUSION

The petition for writs of certiorari should be denied.

Respectfully submitted,

CHARLES M. MCCARTY,
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Prudence-Bonds Corporation
(New Corporation).

March 27, 1950.

APPENDIX

The Bankruptcy Act, as amended by the Act of June 22, 1938 (c. 575, 52 Stat. 840; 11 U. S. C., Sec. 650):

> "SEC. 250. Appeals may be taken in matters of law or fact from orders making or refusing to make allowances of compensation or reimbursement, and may, in the manner and within the time provided for appeals by this Act, be taken to and allowed by the circuit court of appeals independently of other appeals in the proceeding, and shall be summarily heard upon the original papers."